ARGUMENT

In *Morrissey vs. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, the Supreme Court has already stated that confrontation of witnesses is allowable in motions to revoke probation. Petitioner's counsel believes that *Morrissey* should be "tweaked" a little, to establish different levels of due process and confrontation.

Petitioner's counsel limits this appeal solely to Motions to Revoke Probation because he believes there should be different levels of both due process and confrontation at a motion to revoke probation and a motion to revoke parole.

Since this court has already determined that *Crawford* applies to criminal trials that is no longer an issue. However, since *Morrissey* and it's progeny have implied that the defendant has a right to confront witnesses the petitioner believes that, at the very least, on a motion to revoke probation it should not be "a paper trial" where the state merely introduces, through business records, the probationer's file and then rests it's case.

Petitioner's attorney also believes that motions to revoke

parole are entirely different since the defendant is already in the penitentiary and has less of a "panoply of rights" as stated in *Morrissey* and it's progeny.

In *Ash vs. Reilly*, 354 F. Supp. 2d 11, the United States District Court, District of Columbia, also stated that confrontation of witnesses is allowable in motions to revoke probation. Some of these cases even involve motions to revoke parole. There probably should be a difference between and a different level of the "panoply of rights" between probation and parole.

In this case the Petitioner's attorney (as in all probation revocation cases) has had an impossible time getting an honest answer out of a piece of paper. It is impossible to cross-examine a piece of paper. See *Smart vs. State*, 153 S.W.3d 118 (Tex.App.-Beaumont Dec 22, 2004), petition for discretionary review refused [pet. ref'd] (May 25, 2005), rehearing on petition for discretionary review denied [pet. dism'd] (Jun 29, 2005).

The right of confrontation in a motion to revoke probation would not unduly burden the system since the

probation officers are generally available at the courthouse or near the courthouse. Parole revocations may be somewhat different. In Texas the Texas Supreme Court has stated that a motion to revoke probation is a "criminal proceeding" (*Fariss vs. Tipps*, 463 S.W. 2d 176 (Tex. 1971)).

Both the Federal circuits and many states have constantly and consistently mislabeled motions to revoke as administrative or a contract, or, as in Texas, they have done both, and then have also stated it is a criminal proceeding. Thus the confusion.

What Petitioner is asking, in essence, is that *Morrissey, supra*, be "tweaked" to add different levels of the "panoply of rights" mentioned in *Morrissey* and other Federal cases. Since the Court has stated the rights in a criminal trial, this case deals only with a motion to revoke probation. Since the Defendant has never been in jail or in prison we believe there should be more rights than a person who is facing a parole revocation or a person already in prison facing some sort of administrative hearing. There should be different levels of this panoply of rights and this Court should spell them out.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the Court grant a Writ of Certiorari regarding this matter. Petitioner also respectfully requests that this case be reversed and remanded to the trial court to comply with this Court's opinion.

Respectfully submitted.

Dexter M. Patterson
Counsel of Record for
Billy Don Smart

September 2005

APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-04-134-CR

BILLY DON SMART, Appellant,

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Montgomery County, Texas
Trial Court Cause No. 01-162358

FILED DEC 22 2004
CAROL ANNE FLORES, CLERK
COURT OF APPEALS
NINTH DISTRICT
Beaumont, Texas

OPINION

Billy Don Smart was charged with criminal mischief, a Class A misdemeanor, and he pleaded not guilty. The jury convicted Smart of the lesser included offense of Class B misdemeanor criminal mischief. Smart elected to have the trial court assess his punishment. The trial court fined Smart $2000, sentenced him to one hundred eighty days in the Montgomery County jail, and charged him with court costs of $240.25. The fine and court costs were to be paid at the rate of $187.00 per month until paid in full. Smart was also ordered to pay restitution of $260.00 to complainant. The court suspended the imposition of the jail sentence and placed Smart on community supervision for two years, conditioned upon his compliance with all conditions of community supervision. This Court affirmed the trial court's judgment. See *Smart v. State*, No. 09-01-00393-CR, 09-01-00394-CR, 2002 WL 31322735 (Tex.App.-Beaumont 2002, no pet.) (not designated for publication). Subsequently, the State filed an amended motion to revoke Smart's community

supervision, alleging Smart had committed criminal trespass; failed to report to the community supervision office in March 2003; failed to pay a Crime Stoppers fee of fifteen dollars; failed to perform community service restitution in January, February, and March 2003; failed to make fine payments in February and March 2003; and failed to pay court costs in February and March 2003. A hearing was held on the State's amended motion to revoke community supervision. At the hearing, the court liaison for the Montgomery County Community Supervision Department stated she was the custodian of Smart's probation file, the community supervision office maintained records of each probationer's reporting schedule as part of its regular course of business, and entries were made by one with personal knowledge. Citing the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Smart's counsel objected, contending the admission of the records violated Smart's rights under the Confrontation Clause because the liaison testified she did not personally make all of the entries contained in the records. The trial court overruled the objection and admitted the file as State's Exhibit 3 under the

business records exception to the hearsay rule. *See* Tex.R. Evid. 803(6).[1] The court liaison also testified her office maintained records in the ordinary course of business which detail violations of community supervision, and the court admitted the records as State's Exhibit 4, overruling another *Crawford* objection by Smart's counsel that, because the witness did not personally compile the records, Smart's rights under the Confrontation Clause were violated. The trial court found insufficient evidence to support the State's allegations of criminal trespass and failure to pay the Crime Stoppers fee, but found the remaining allegations were supported by sufficient evidence. The trial court entered an order which revoked Smart's community supervision and sentenced him to confinement in the Montgomery County jail for ninety days. In this appeal, Smart contends the trial court "erred in not applying the dictates of *Crawford v. Washington*[.]" The applicability of Crawford and the Confrontation Clause to the proceeding below

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[1] Generally, records admissible under the business records hearsay exception "that by their nature were not testimonial" were not the focus of the *Crawford* decision.
Crawford, 124 S. Ct. at 1367.

is an issue of law which we review *de novo*. See *Beeman v. State*, 86 S.W.3d 613, 620 (Tex.Crim.App.2002). The Sixth Amendment's Confrontation Clause provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him...." U.S. Const. amend. VI. In Crawford, the United States Supreme Court held:

> [w]here testimonial evidence is at issue, ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. 36, 124 S.Ct. at 1374 (footnote omitted). However, like parole revocation, community supervision revocation is not a stage of a criminal prosecution. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656

(1973); see generally *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (revocation of parole is not part of a criminal prosecution). A community supervision revocation proceeding is an administrative hearing, not a criminal trial. See *Cobb v. State*, 851 S.W.2d 871, 873 (Tex.Crim.App.1993); *Bradley v. State*, 564 S.W.2d 727, 729 (Tex.Crim.App. 1978) ("The relationship between the probationer and the court is contractual in nature."). *Crawford* addressed an out-of-court testimonial statement offered in a criminal trial, and is not directly applicable in this revocation proceeding. See *United States v. Aspinall*, 389 F.3d 332 (2nd Cir. 2004); but see *Ash v. Reilly*, No. 03-2007, 2004 WL 2800937, at *8, 2004 U.S. Dist. LEXIS 24451, at *16-17 (D.C.Cir. Dec. 7, 2004) (Court held a criminal defendant in a parole revocation hearing is entitled to confrontation.). In *Morrissey*, the Supreme Court held a parolee is entitled to due process before parole is revoked to assure "the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey*, 408 U.S. at 484, 92 S.Ct. 2593. Due process in a revocation proceeding includes the "right to confront and cross-examine adverse witnesses (unless the

hearing officer specifically finds good cause for not allowing confrontation) [.]" *Id.* at 489, 92 S.Ct. 2593; see also *Ex Parte Taylor*, 957 S.W.2d 43, 44-47 (Tex.Crim.App.1997). The Supreme Court made clear in *Morrissey* that "there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." *Morrissey*, 408 U.S. at 489, 92 S.Ct. 2593. The Court further explained "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* Nothing in *Crawford* suggests that the Confrontation Clause, which applies to criminal trials, alters the standard set forth in *Morrissey* for the admissibility of evidence in a revocation proceeding. See *Aspinall*, 389 F.3d 332, at 340. Appellant challenges the admission of records solely on the applicability of *Crawford*. Appellant's issue is overruled, and the judgment of the trial court is affirmed.AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on Nov. 11, 2004
Opinion Delivered Dec. 22, 2004
Publish Before McKeithen, C.J. Burgess and Gaultney, JJ.

APPENDIX B

In The

Court of Criminal Appeals

No. PD-0215-05

BILLY DON SMART, Appellant,

V.

THE STATE OF TEXAS, Appellee

OFFICIAL NOTICE FROM

COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

DATED: 6/29/2005

COA #: 09-04-00134-CR

RE: Case No. PD-0215005

STYLE: SMART, BILLY DON

On this day, the Appellant's motion for rehearing has been denied.

Troy C. Bennett, Jr.

APPENDIX C

In The

Court of Criminal Appeals

No. PD-0215-05

BILLY DON SMART, Appellant,

V.

THE STATE OF TEXAS, Appellee

OFFICIAL NOTICE FROM

COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

DATED: 5/25/2005

COA #: 09-04-00134-CR

RE: Case No. PD-0215005

STYLE: SMART, BILLY DON

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

APPENDIX D

NO. 01-162358

STATE OF TEXAS	§	**IN THE COUNTY COURT**
	§	
vs.	§	**AT LAW NO. 2**
	§	
BILLY DON SMART	§	**OF MONTGOMERY COUNTY, TEXAS**

ORDER REVOKING COMMUNITY SUPERVISION

On this the 11th day of March, 2004, the State appeared by her Assistant District Attorney for the State of Texas and the Defendant appeared in person (and by counsel, D. Patterson), (and knowingly, intelligently and voluntarily WAIVED the right to representation by counsel) and the Court having heard the Defendant's plea of TRUE and have considered the same finds:

That the State had filed a Motion to Revoke Community Supervision of the said Defendant. And that the Court, after examining and considering the written motion and after hearing the evidence submitted by both the Defendant and the State of Texas, is of the opinion that on the 22nd day of August, 2001,

said Defendant was convicted of a misdemeanor offense and punishment was assessed at a fine in the total sum of $2000.00, court costs in the total sum of $_____, attorney fees in the total sum of $_____ and sentenced to confinement in the Montgomery County Jail for a period of 180 days; however, the imposition of said sentence was suspended and the Defendant was placed on Community Supervision for a term of two years subject to certain terms and conditions. The Court is of the opinion and does so find as a fact that the Defendant has violated the terms and conditions of his/her Community Supervision, to-wit:

See Exhibit 'A', which is attached hereto and incorporated herein for all intents and purposes.

It is therefore CONSIDERED, ORDERED and ADJUDGED by the Court that the Order suspending the imposition of the Sentence and placing the Defendant on Community Supervision heretofore entered in the cause be, and the same is hereby REVOKED.

And it appearing to the Court that the ends of justice will best be served by a reformation of the Judgment herein, it is now therefore ORDERED and ADJUDGED by the Court

that this Judgment be reformed and the jail sentence be 90 days in the Montgomery County Jail, and a fine of $2000.00.

The Defendant is credited with any hours/days/years.

The Defendant is given credit for any fine, court costs and attorney fees, if any, already paid or satisfied by time served.

The balance of outstanding fine, court costs and court appointed attorney fees, if any, is $2550.25.

Court appointed attorney fees of $ _____ (WAIVED) assessed in this judgment reformation is included in the outstanding balance below.

Defendant to serve outstanding monies owed totaling the amount of $2550.25 concurrent to the jail time assessed to this judgment.

Defendant to pay any outstanding monies owed totaling the amount of $_____ on or before _____, 20___.

Thereupon the Court assessed punishment against the defendant at 90 days in the Montgomery County Jail and a fine of $_____.

The Defendant is remanded to the custody of the Sheriff until the Defendant has satisfied the jail, fine, court costs and

attorney fees, if any, assessed in this case.

ENTERED and SIGNED this 11th day of March, 2004.

/s/ Jerry Winfree
JUDGE PRESIDING
County Court at Law #2
Montgomery County, Texas

FILED FOR RECORD
2004 MAR 12 AM 11:05
COUNTY CLERK
MONTGOMERY COUNTY, TEXAS

SENTENCE

This cause was called for sentencing on this the 11th day of March, 2004, and the Assistant District Attorney on behalf of the State of Texas appeared as did the Defendant in person and with counsel, D. Patterson, (or if WAIVED, the Court finds that the Defendant did so knowingly, intelligently and voluntarily), in open Court.

It is hereby ORDERED that the punishment assessed herein be carried into execution according to law.

Defendant remanded to the custody of the Sheriff until Judgment in this case is satisfied.

Defendant to surrender to the Sheriff of this County on the following dates and times: Instanter.

Signed this 11th day of March, 2004.

/s/ Jerry Winfree
Judge Presiding
County Court at Law No. 2
Montgomery County, Texas

/s/ Billy Smart
Defendant
Defendant's Right Thumbprint: